REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

ADMINISTRATIVE DECISIONS TRIBUNAL INQUIRY

_____

At Sydney on 21 August 2001

_____

The Committee met at 10.00 a.m.

_____

PRESENT

Mr P. G. Lynch (Chair)

Legislative Council	Legislative Assembly
The Hon. P. J. Breen	Mr M. J. Kerr
The Hon. J. Hatzistergos	Mr W. D. Smith

MURRAY BRYON KELLAM, President, Victorian Civil and Administrative Tribunal, 55 King Street, Melbourne, sworn and examined:

CHAIR: Justice Kellam, we are delighted that you have accepted our invitation to appear before the Committee to give evidence. In what capacity do you appear before the Committee?

Justice KELLAM: I am a Justice of the Supreme Court of Victoria and I am also the President of the Civil and Administrative Tribunal. I understand that it is in relation to the latter office that I hold that you wish to speak to me.

CHAIR: Have you received a summons to appear before the Committee today?

Justice KELLAM: I have, Mr Chairman.

CHAIR: Would you like to make an opening statement?

Justice KELLAM: Yes. I have been provided with the material from the Committee. I am contemplating the answering of questions more than the making of statements, but I will give a brief background to the creation of VCAT in Victoria. In 1996 a paper was prepared by the Attorney General's office and presented to the various courts and the various interested bodies in Victoria. It was headed "Tribunals in the Department of Justice: A Principled Approach". The concerns that were set out in that paper were really the ones that your Attorney General Mr Shaw had stated in your own discussion paper which I have seen. They related to fragmentation and inconsistency of approach.

There were quite significant concerns about the independence of the tribunals. Members had different terms. Some had one year, some two, some three. It was not uncommon practice for what I might term “unwanted” public servants to be moved from their position in the public service into a Tribunal position and there were real issues about the question of independence. There was only one tribunal in Victoria, the Administrative Appeals Tribunal, that was led by a County Court judge. The paper distributed in 1996 contemplated the establishment of a judicially-led umbrella tribunal. There was general support for that, although a number of the smaller tribunals resisted the proposition of amalgamation. To some degree that battle went on until 30 June 1998, which was the day before VCAT commenced operation. The Anti-Discrimination Tribunal in particular strongly expressed opinions that its functions should not be merged into an amalgamated tribunal. Some of the other smaller ones held similar views.

In 1998 on 1 July VCAT was created. It was amalgamation of 15 previously separate boards, mostly within the Attorney General's portfolio. It was established really to provide an umbrella of procedures. Each of the jurisdictions has its own enabling legislation and operates under that legislation. The tribunal has two divisions, administrative division and a civil division. The Administrative Division deals with administrative review of a great variety of government decisions — freedom of information, transport accidents. The Civil Division is what might be called inter-parties disputes — residential tenancies, credit. It deals with the old Credit Tribunal issues but it also includes guardianship, which is not a true inter-parties jurisdiction. Each of the two divisions is headed by a County Court judge who is full-time on the tribunal. We have three judges there who are generally full-time. We also now have two other judges who can be called in for specific cases.

The individual jurisdictions, of which we now have 11, are termed lists. The Planning list does the work of your Land and Environment Court. That is the in the Administrative Division. The General list deals with general administrative review. It fits into the Administrative Division. We have an Occupational and Business Regulation list. It is a list that handles all occupational and business licensing reviews, disciplinary reviews and those sorts of things. For example, the Medical Board is separate from the tribunal but the tribunal will review its decisions. The Nurses Board is separate but the tribunal will review its decisions. It would deal with physiotherapists, psychologists and a vast range of other occupations. In terms of some occupations, however, the tribunal is really a first point of review. At the time of the creation of the VCAT the Government created an organisation called the Business Licensing Authority. It deals with the regulatory day-to-day licensing functions. But if there is a decision not to license it may be reviewed by the tribunal. If there is a decision to remove a

licence it may be reviewed by the tribunal. That now covers functions such as estate agents, travel agents, prostitution, motorcar traders and a variety of other occupations.

That was in 1998. Moving on from there, the tribunal has become less and less a creature of the Attorney General's Department as functions of other departments have come in. The former Liquor Licensing Commission of Victoria, which was part of a separate department from the Attorney's department, has now had its enforcement and regulatory functions transferred into the tribunal. That is perhaps one nice example of an amalgamation because now instead of hotels and other liquor outlets having to make separate planning and liquor applications, they can double barrel them. It is a nice example of a benefit of the amalgamation. If someone wants to build a large hotel in an outer suburb all of the relevant regulatory matters can be dealt with in one hearing. We will have a person who is a liquor expert as well as planners sitting on that sort of application. Bit by bit other jurisdictions are being transferred from other departments into the tribunal. That is a brief, thumbnail sketch of what has taken place.

CHAIR: You have sent some documentation to us that will be tabled before the Committee: the original discussion paper issued by the Attorney General's Department in Victoria, the paper given by you at the Centre for International and Public Law in Canberra on 11 November, and the paper given by Robin Creyke, Reader in Law at the ANU, and the first and second annual reports of VCAT. In the Attorney General's discussion paper a number of undesirable consequences were listed of what was termed the undisciplined proliferation of tribunals. I would like to take you through each of those and see whether those undesirable consequences have in any sense been removed by the establishment of VCAT. The first is the duplication of tribunals.

Justice KELLAM: When VCAT was created we inherited seven separate computer systems. We now have two. We have one that runs the high-volume areas such as residential tenancies and guardianship. We do 9,000 guardianship cases a year. Quite a number of them are reviews. Victoria requires a three-yearly review of guardianship decisions. Residential tenancies this year will do about 75,000 cases. The two new computer systems are designed to deal with the high-volume work. You can imagine how it was with seven computer systems. This year the tribunal will do more than 90,000 cases. The year before the commencement of VCAT it was about 68,000 across the board. The registry staff is not very much bigger than it was at the time we accumulated all of the registries. The concern about having all the separate registries has been significantly resolved by VCAT.

CHAIR: The second item on the list is the potential capture of tribunals by particular interest groups. I would be interested to know what that means and whether it has been resolved.

Justice KELLAM: I believe that comment was probably more related to two areas. One is planning. Planning in Victoria is the same as in New South Wales as far as I can comprehend it. If you cross out Land and Environment Court and put in VCAT it would be the same argument we read in Melbourne. I think it was felt in government that a small tribunal was a difficult political situation and could be the subject of pressure that would not apply to a larger judicially led tribunal.

I think the other aspect of that may well have been—and I was not involved, I must say, in the paper at that time—concerns about some of the professional boards. For instance, in relation to the Estate Agents Board, at the time the Act required that whenever the board sat a lawyer should be the presiding member and that it should also have a representative of the estate agents profession and a community representative. That has changed with VCAT. Those Acts were amended at the time of the commencement of the VCAT Act not to have that requirement although the requirement went into our rules. To some degree this was a step-by-step evolution and it seemed to me to be sensible politically not to rock the boat too much to change things overnight.

I have now taken the firm view, as distinct from the clear intention of the previous legislation, that there should be people sitting who represent interest groups, that the tribunal should be sufficiently skilled to deal with issues impartially. There should not be anyone specifically representing a specific group. VCAT has really got rid of representation of interest groups. I did a case not too long ago involving issues of probity with an estate agent. I had an estate agents sit with me because the matter involved some quite complicated processes of advertising and commission arrangements with large newspapers. I had him sit with me as an expert rather than as a representative of estate agents. My understanding is that that is the thrust of that comment.

CHAIR: The next item is unnecessary differences in procedure?

Justice KELLAM: Yes, the VCAT Act has basically a common procedure in terms of application but with "swerves" for the relevant jurisdiction. I would think that there has been some refinement of the processes. I would not say that there has been an enormous change. I think if you went and sat in a guardianship hearing today and saw a video of it five years ago you would see little difference. In terms of the dedicated approach to specific areas of jurisdiction, I do not think we have changed things but we have been able to modify application forms so that they are basically common across the jurisdictions. In my view that means that we have been able to make the tribunal more accessible to people because it is all on a web site. These common application forms are in every Magistrate's court, in the libraries and all over the State. That is the system of accessibility of the tribunal. In terms of the actual procedures in some areas I think we have not changed a lot.

CHAIR: One of the problems with distinct tribunals is that they seem to become known by a very small group of people and there is just no broader general accessibility. Has the amalgamation to some extent overcome that problem?

Justice KELLAM: Interestingly enough the old Small Claims Tribunal was doing about 2,500 cases a year as its own small tribunal. It was reasonably well promoted by the Office of Fair Trading but obviously it was not really well known. That part of our tribunal this year will do 5,000 cases so that the business has doubled in three years partly because of some expanded legislation but I suspect because it is now much more accessible. It is now known to be part of the jurisdiction of this tribunal which is very well-known. There is not a week when it is not in the press about something or other—regrettably sometimes about planning!

CHAIR: The next undesirable consequence that is mentioned is an inconsistent approach to small legal issues?

Justice KELLAM: Yes. I am not quite sure of what the problem was in terms of the separate tribunals but we have endeavoured to try to develop a consistency of approach across the tribunal in terms of the legal approach but, on the other hand, we have tried to keep some approaches separate and designed for the jurisdiction, so it is a bit of a balancing act. This is not so much the amalgamation but it is the issue of judicial leadership, I think the fact that the judges have their doors open—it is commonplace now for members who have a problem to come and see one of the judges about how they might handle it, and I hope that is adding to the quality of the decision-making.

CHAIR: Is there any danger in creating the amalgamation that all you might be doing is simply lumping a whole series of different tribunals together and essentially they would maintain their separate identities and get nothing more than a new title?

Justice KELLAM: I think there is a balance. One criticism of VCAT before it commenced—and perhaps in some quarters since—was that it would just derogate down to the lowest common denominator and that you would have all these people making decisions, some in areas about which they know nothing, so we have had to walk the balance and this is one of the reasons why we have lists. In fact, our rules have our membership allocated to the list by me. If you are a member of VCAT you are a member of the tribunal but you do not have a licence to sit in every jurisdiction but you are allocated to a list. So some of our members, for instance, our planners do not sit anywhere else but in planning. Others, our lawyers, might sit in guardianship and a variety of other places so you have got to balance it. You have got to try to maintain the specialty expertise of the individual tribunal and, at the same time, use the benefits of a big organisation. I think we have done a lot more than just amalgamate a set of tribunals under the one umbrella.

Some examples that I can give are these: As a judge I can recall on circuit having gone to the car park and wondered why it was full in some circuit town and it was because the Guardianship Board, the Residential Tenancies Tribunal and the Small Claims Tribunal were there—three cars, three people, three jurisdictions. Now we would have only the one car, one person dealing with all of those cases. Another benefit of the amalgamation is that sometimes there are skills in a separate tribunal that might be used in another tribunal. Let me give you an example. Not long after VCAT started there was an application in Victoria of anti-discrimination by a footballer who had been

banned from playing football because he was HIV-positive. It was a very significant social case in Victoria. For that reason I decided I would sit on it. I got a doctor who was a member of the Guardianship Tribunal into the anti-discrimination list and he sat with me—the case was really about epidemiology. It was very helpful having a physician who had done quite a lot of work in epidemiology sit with me. That was in about the first two months of VCAT. Previously he had been a member of the Guardianship Tribunal because of the requirements of that jurisdiction but he was very useful in this particular case.

Likewise, in some of the prostitution cases that the tribunal has done, health issues have become issues of significance and we have been able to borrow expertise from what were previously separate tribunals. That cross-fertilisation of skills is useful and one big benefit. The resourcing of a big tribunal is another issue of significant benefit. It does mean that you can really get more hours, more productivity out of a member. For instance, if a member of the Residential Tenancy Tribunal went to the small town of Horsham there might only be an hour's work in the old days and the Small Claims Tribunal would turn up next week but now we will do that in one sitting. In terms of a large tribunal other resources are available. VCAT has a $20 million budget and that means that we can provide video conferencing. We have been able to invest very heavily in information technology. Our residential tenancy lists had the first Internet online application process in Australia start-up last September which means that if you are registered you can file your application at the library or at the local tenancy co-operative or wherever. The benefit from our viewpoint is enormous because 20 per cent of applications that came in for residential tenancy were wrong and had to go back, and the administrative process involved in that was really significant. The computer system will not permit an incorrect application to be lodged, so they are now all correct and all that administrative re-posting and delay has gone.

That facility might have been available to the Residential Tenancies Tribunal by itself because it was a fairly big tribunal but being part of a larger organisation it has enabled us to get that sort of funding, and that is a very significant issue. In terms of the management of the tribunal and the assistance given to the tribunal by the Department a big tribunal has significant advantages. I can speak to the Attorney General this afternoon about an issue which has arisen in the tribunal, if I wish. I am confident that the President of the Credit Tribunal three years ago would have had a lot of bureaucratic hurdles to jump before that issue might have been resolved. There are some significant advantages in size. Some of these things are not, of course, factors of size they are also an issue of judicial leadership.

CHAIR: I think you have covered the next point about the unduly narrow specialisation by tribunal members. My next point relates to poor service delivery to people living in the rural parts of the State. That is a function of size.

Justice KELLAM: That is very much a function of size. The number of places that VCAT attends as compared to the combination of the old tribunal has now increased by 30 per cent but, of course, videoconferencing and telephone conferencing is part of it. We have also tried to use some efficiencies with the courts. The tribunal is clearly recognised as a fourth partner with the magistrates court and two superior courts and some of the economies of that association are to the benefit of the rural and regional community.

We have six magistrates who are also sessional magistrates of VCAT so if we have one small claim or one residential tenancy matter to be heard in a small country town, rather than that person having to wait for the visit of the tribunal three weeks hence, our listing co-ordinator will ring up the Horsham Magistrates Court and say, "We have one case. Will you please put it in your list for tomorrow or the day after?", and the magistrate will take off his magistrate's hat at 4 o'clock and put on his VCAT hat and deal with it. Those economies are delivering a much better service to the rural area than previously.

We are able to combine the options so that small claims and residential matters are dealt with at the same time by the one member, perhaps even guardianship matters, although we tend to have a specialist with guardianship matters, depending on the issue. When we combine those functions, we can have bigger lists and attend more often. Rather than sending someone to a small town for four cases, they will go for eight. It is worth going more often. I am confident that the larger tribunal provides a much better service to regional Victoria than the old ones.

The Hon. PETER BREEN: Does the tribunal actually have hearings in the Local Court as it does in New South Wales?

Justice KELLAM: Yes. It depends what jurisdiction is being dealt with. We will sit in the Local Courts. Certainly most planning takes place in Local Courts. The general list, which is doing motor car, Transport Accident Commission reviews, sits in the Local Courts. With guardianship matters we tend to go to the people, to the hospital, the nursing home or to the mental health institution but the rest of it we do mostly in suburban and rural courts.

The Hon. PETER BREEN: Are the people who access the system able to distinguish between the tribunal or court process?

Justice KELLAM: I think so; I would hope so. This has been part of the amalgamation. Some processes differ little. For instance, if you are doing a review of a medical board decision where a doctor has lost his right to practise I suspect that if you sat in there you would see little difference between that and a court because we take the view that with that sort of case proof ought to be exact and there ought to be some formality about the process. On the other hand, one would not recognise guardianship matters as a court because people sit around a table like this and talk to each other across the table, often using Christian names. It is an informal process. Planning matters are similar. Our planning people sit around the table with the plans. You would not recognise that as a court. I think the community does not confuse the two but there is a range of processes from formal to informal.

The Hon. PETER BREEN: Are the forms now standard across the jurisdictions?

Justice KELLAM: Not completely but similar, yes. We have application forms for each list but they are very similar. They have a different heading but that is really for our benefit in terms of computer handling of the forms. We have also worked very hard to have them in plain English. I have to say that we have not done well in producing the forms themselves in languages other than English. That is something we have been looking at. We have information guides in half a dozen languages but the forms themselves are very difficult in that sense, but they are basically common.

The Hon. PETER BREEN: You said there was an increase in the workload of small claims from 2,500 to 5,000. Is there any suggestion that that is to be compared with the comparable drop in the workload of the Local Court, for example?

Justice KELLAM: Yes I think there is. The civil work in the Magistrates Court has been declining over recent years. Some years ago I remember the number was something like 120,000 civil cases were conducted by the Magistrates Court and last year the number was about 80,000, so that is dropping. Some of that obviously is going off to perhaps the County Court, I do not know, but certainly quite a bit of it is coming to us, there is no doubt about that and, frankly, I think it should. To have to pay fees to involve lawyers in a $7,000 case is not productive.

The Hon. PETER BREEN: We have recently increased the jurisdiction in the Local Court for small claims to $10,000. It occurs to me that those claims are better resolved from the consumers' point of view on an informal basis by a tribunal.

Justice KELLAM: VCAT's jurisdiction varies. For some we are competitive with the court or it is concurrent, that is one area, and others we have an exclusive jurisdiction. Small claims are concurrent. Our limit is $10,000. I have been very resistant to it going up beyond that. There was a suggestion put to me by the department a year or so ago that it might go up to $25,000. I have resisted that because right now we do not let lawyers into civil claims or residential tenancies without leave. Obviously, if a person is disabled or is an infant we will grant leave but you have to apply for leave to be represented. For instance, a dry cleaner who gets taken to our tribunal over a $3,000 wedding dress might be able to pay that on his bankcard but a $25,000 claim might send him bankrupt and it would be hard not to say that if he is going to lose his business he is not entitled to representation.

I have been fairly keen to keep the level pegged at $10,000. It went up to $10,000; it was $7,500 before that and $5,000 not long before that. I could have brought a chart for this. The majority of the claims are in the range of $3,000 to $5,000 in that $10,000 bracket. I think keeping lawyers out

is good. People can come along and we try and conciliate with them. With the small claims the member will try and broker a deal and if it cannot be done we will get on and make the decision. It is very informal, quick and it is generally well accepted by the community. It is pretty cheap justice, but it is justice.

The Hon. PETER BREEN: I wonder if I could put to you a situation that I experienced recently in New South Wales in relation to lawyers' fees. The jurisdiction in the Fair Trading Tribunal in New South Wales is $25,000. To dispute a lawyer's bill of $20,000 going through the Supreme Court process is quite difficult. If, on the other hand, you were to go to the Fair Trading Tribunal in New South Wales to dispute the bill, you actually might find yourself in a more friendly jurisdiction and certainly one that is not so overwhelmed by lawyers. Would you be able to say whether there has been any similar experience in Victoria of people disputing legal fees in the tribunal rather than in the normal forums?

Justice KELLAM: No, we have not had that yet, although we now have a Fair Trading Act that came in 18 months ago and I think it is possible that certainly a case could be run under the Fair Trading Act. It may have happened once and I do not know about it, of course. It is not something I am aware of. Part of the reason for that is that those sorts of issues tend to go through the Legal Ombudsman into the Legal Professional Practice Tribunal, which is still separate. It is the one in Attorney General's tribunal which did not come into VCAT at the start.

CHAIR: It means that the lawyers in Victoria are much more organised than the lawyers in New South Wales.

Justice KELLAM: That is one conclusion you could draw. Another is that it had been fairly recently created and there was some political difficulty about it. In any event, a discussion paper has been recently prepared by Professor Sallmann, who was the former executive officer of the Australian Institute of Judicial Administration raising the issue of whether that tribunal should be merged with VCAT. It is under discussion now. The sorts of problems you are talking about tend to go to the Legal Ombudsman and into that tribunal but I know that they are inundated with those sorts of complaints.

The Hon. PETER BREEN: The Legal Services Commission in New South Wales has a similar problem but unlike the situation in Victoria there is no independent Ombudsman as such so it is still basically within the ambit of the Attorney General's Department. Is that the case in Victoria? The Attorney General has control over the Ombudsman?

Justice KELLAM: Yes, control in a broad sense. The Legal Ombudsman is an independent office that is under the auspices of the Department of Justice and the Attorney General.

The Hon. PETER BREEN: Do you have a view that you are willing to express about whether the administrative decisions in relation to lawyers should come within the Victorian tribunal?

Justice KELLAM: Perhaps I will not express a view because it is a matter of debate right now. The Law Institute of Victoria has been supportive of the transfer of those responsibilities into VCAT and has made that submission. The Bar Council opposes it and I think the debate is very actively under review. From my viewpoint, I do not have any difficulty in saying that the tribunal would have the capacity to do it because I think that disciplinary matters, as a matter of law, are clearly the same, be it doctors, nurses, solicitors, barristers; it is the same law. You are applying the same standards for the protection of the public. I do not have any problem about that. It may well be that there would have to be some fine-tuning about how we did it. It might well be preferable to have the judges of VCAT sit on many of those disciplinary matters. It might be an argument for why that is appropriate and that would not be a problem.

I have pretty well done that in terms of doctors. If doctors are struck off and they come to us for a review, I have taken the view that those sorts of cases are of such significance that judges ought to sit on them if they can and now a doctor usually sits on those cases too. The answer to your question is I do not think it is appropriate for me to answer in terms of policy because that is a policy consideration now but if it was sent to VCAT, we would have no difficulty dealing with it and there is a strong view that Victorian cases should come to VCAT. The tribunal is presently headed by a

Supreme Court judge, which was one of the issues at the time of the amalgamation as to whether it should come in or not.

The Hon. PETER BREEN: Can I ask you about the name. I notice that the word "civil" appears in the name of your tribunal. Ours is called the Administrative Decisions Tribunal. Do you see any advantage in changing the name or adding the word "civil"?

Justice KELLAM: The Government wanted to make it clear that it was not merely an administrative review tribunal so we have the two divisions, the civil division and the administrative division. They wanted to make it clear that it was different to an administrative review tribunal and that is why they chose the name but it is certainly a mouthful. If they ever amalgamate all tribunals under one umbrella they can call it Tribunal Victoria!

The Hon. PETER BREEN: Do you have a view about whether or not the word "civil" should be included. Do you think it is an advantage? I am talking about from the point of view of consumers who might need access to some tribunal and who want to be recognised in some way. The use of the word "civil" or "citizen" might mean that people can more readily identify with it.

Justice KELLAM: It says something; it says that it is about civil rights. I do not know whether a better word could be used. At one stage there was consideration of whether the word "consumer" should be included, but that would not cover the sort of protective work that is done in guardianship, anti-discrimination and those sorts of areas. In the end, the word "civil" is probably as good as we can do.

The Hon. PETER BREEN: Are there any comparisons to be made with what has happened federally in relation to the amalgamation of organisations such as the Immigration Review Tribunal?

Justice KELLAM: I am not quite sure where the Federal situation is today compared with a couple of months ago. There are some benefits with an amalgamated approach to registry and dealing with those issues, on the other hand I argue that there is a lot to be said for judicial leadership. I would also argue that there is a not to be said about the leadership having some sort of tenure. As I understood the Federal proposals, there was to be no judicial leadership. Indeed, the president of the then proposed organisation was, not be a lawyer and in any event was to be on contract. I think that is a fairly unsatisfactory approach.

The Hon. JOHN HATZISTERGOS: A performance contract?

Justice KELLAM: Yes, a performance contract. The idea behind VCAT was to make it more independent of the executive. If one is to examine the two models, I believe that the VCAT model achieves the desired outcome more than does the proposed Commonwealth model.

The Hon. PETER BREEN: I am not sure where the Commonwealth model stands, but I know that there was a lot of resistance, certainly from the legal profession, to the idea of no tenure and no judges to be retained in respect of separate jurisdictions, particularly when issues at the Federal level seem to be more profound.

Justice KELLAM: The tenure issue will always be difficult with tribunals. At VCAT we have a five-year membership term. When VCAT commenced, it was quite extraordinary because it was all over the place like a dog's breakfast. One person had a 20-year term, another person had two years, three months and 11 days, and, of course, that was the expiry of his executive contract. When he moved from the public service into the tribunal his term was "for the balance of his executive contract". Those sorts of contracts are over.

At the time of the bill coming into effect I discussed with the Attorney that seven years would be a good term of tenure for tribunal members. My argument was that there would be at least two elections in a seven-year term. At that stage in Victoria there was some consideration of three years, but five years was adopted. It depends upon the jurisdiction, but when VCAT was created there was very significant public interest about quite a number of applications under freedom of information legislation.

I headed the private prisons FOI inquiry and determined that the contracts should be released. When there were issues of tenure, it was better for me, in my circumstance, to make that difficult public decision than for a member who, perhaps, had two years to go on a term. During those days there were a number of decisions which we deliberately said needed to be made by judges. The casino freedom of information case was run by a judge. The ambulance inquiry, which led to a royal commission, was also done by a judge.

Recently I sat on a planning case about whether a needle exchange program should be permitted in a large shopping centre in Melbourne. There was a lot of hot community debate about that. In the end I thought that it was better to have a judge make that decision rather than one of our tenure members. I am not accusing Government of malice, but when dealing with issues of tenure there are some cases in some parts of the jurisdiction in which it would be better for a judge to make the decision rather than someone who has a relatively short term to go, particularly with freedom of information.

The Hon. JOHN HATZISTERGOS: That depends on expectations of the tenure member; if they intend to see out their term and return to private practice or some other activity, it would not cause as much of a problem.

Justice KELLAM: No, but in the sort of climate we are talking about, it tends to happen.

CHAIR: It is perception as much is the reality, is it not?

Justice KELLAM: Yes, I think that is right. A member making a very difficult public decision, when his or her term is about to expire during the term of the current Government, is in a very difficult position whether it is a matter of perception or not.

The Hon. JOHN HATZISTERGOS: How many members have been reappointed, what is the turnover rate?

Justice KELLAM: I cannot answer that precisely. We now have 38 full-time members, and there were 43 when the organisations merged. The number of full-time members has decreased and quite a number of full-time members' terms have not been renewed. A number more have been reappointed; I guess the majority have been reappointed. However, not all of the terms have fallen over as yet. The members of the old tribunal carried their old terms into the new tribunal. When their terms expire, they will be reappointed. I think most of them have been reappointed, but not all, as a deliberate decision.

The Hon. JOHN HATZISTERGOS: For any particular reason?

Justice KELLAM: Yes, one of the things that occurred at VCAT was that whereas previously this was almost entirely a decision of the department or the Attorney General, I entered into a protocol with the Attorney General as to membership reappointments. I have had a fair bit of input into those reappointments. My view on competence and capacity was relevant in some cases. I can confidently say that any issue of reappointments since the commencement of VCAT has not had any political or other overtones. In fact, the protocol I have with the Attorney is that appointments will be made on merit.

Mr KERR: You mentioned the footballer who tested as HIV positive. What was the cause of action that brought that to your attention?

Justice KELLAM: Anti-discrimination. He told the football club that he wanted to register that he was HIV positive. The football club informed the Victorian amateur association, and that association refused to give him a permit. So the footballer proceeded against the association in anti-discrimination.

Mr KERR: You said it was a controversial case.

Justice KELLAM: Yes, it was.

Mr KERR: What was the nature of the controversy, and what were the issues?

Justice KELLAM: The football clubs said that it was outrageous, that they would not be able to play football if people with HIV were allowed to run around the field. It was discussed on all the television football shows and, of course, there was the other side of the argument.

Mr KERR: Was the issue that other people could catch AIDS from him?

Justice KELLAM: Yes, that is what was said.

Mr KERR: It turned on a medical question?

Justice KELLAM: The decision turned on the numbers. There is no known case of transfer of HIV on a football field anywhere in the world. There is one soccer case in Italy, which is suspect, because the person who contracted HIV was an intravenous drug user. That one case is equivocal, and there is no other case. That was the epidemiology.

Mr KERR: It would be a bit unfortunate if you had pioneered it, as a footballer.

Justice KELLAM: That was the decision, which you can read. The decision also said that football clubs are better off taking appropriate steps to prevent contamination than excluding a known carrier, because they cannot exclude the person they do not know.

The Hon. JOHN HATZISTERGOS: How do you define the appropriateness of a particular jurisdiction to be added to your collection? It seems to me that at number of the matters you deal with we have to determine judicially. Is it better that they be dealt with administratively or judicially? What qualities should a particular area have so it can be appropriately determined by your tribunal as distinct from a court? For example, you mentioned planning. It seems to me that some of the planning responsibilities that you have are dealt with by the Land and Environment Court, but the Land and Environment Court also has jurisdiction in a wide range of other matters.

Justice KELLAM: Yes.

The Hon. JOHN HATZISTERGOS: What is it about the particular nature of the jurisdiction that makes it amenable to your form of justice?

Justice KELLAM: With reference to planning, ours is the merit review of council decisions. It is much broader in Victoria, because objectors have a right of appeal.

The Hon. JOHN HATZISTERGOS: They do here too, but it is a bit limited.

Justice KELLAM: It is unlimited in Victoria. Environmental enforcement is done by the courts.

The Hon. JOHN HATZISTERGOS: Injunctions?

Justice KELLAM: Yes, but the judicial members of VCAT have power to injunct in certain circumstances.

The Hon. JOHN HATZISTERGOS: You would not have criminal jurisdiction?

Justice KELLAM: No. In some ways it is a matter for government to decide what can be better dealt with by a tribunal than a court. What the tribunal can do well is to deal with cases which are an amenable to alternative dispute resolution processes to more than pure arbitration. We have introduced mediation into planning, and that is proving to be fairly successful. Guardianship, anti-discrimination and those sorts of areas require an approach that is fundamentally different from a court approach and are amenable to a tribunal. Cheap resolution of small claims and neighbourhood disputes are fundamentally better dealt with by a different process than pure arbitration.

We have retail tenancies as an exclusive jurisdiction in the tribunal and that lends itself very well to mediation or conciliation processes rather than the pure hearing of the dispute. Wherever there is a relationship between the parties it is amenable to a different process by way of mediation or other alternative dispute resolution process. In the end, any form of dispute resolution which lends itself to being done more informally and cheaply can be done by tribunals.

Another area that is relevant to your question is whether the subject matter lends itself to being considered by an expert. Much of our domestic building work is dealt with at mediation by a person other than a lawyer, for example an engineer, builder or surveyor. Those expert areas are relevant to tribunal application rather than a court. In Victoria we do not have any opportunity for experts to sit with judges. Our rules permit referral out to an expert.

The Hon. JOHN HATZISTERGOS: A referee?

Justice KELLAM: Yes, to a special referee. A tribunal that can have an expert sit on a case. That is the sort of work that tribunals do better than courts, and more cheaply.

The Hon. JOHN HATZISTERGOS: We sort of have that with the Land and Environment Court. We have non-lawyers sitting as assessors.

The Hon. PETER BREEN: How many judges are in the tribunal as opposed to members?

Justice KELLAM: Well, we have the President, who is a Supreme Court judge, and the head of the Civil Division must be a County Court judge and the head of the Administrative Division must be a County Court judge. In addition we have two other judges who sit mostly at the court but who can be brought in for specific cases. So, we really have three basically full-time although I sit in the Supreme Court about one week a month.

The Hon. JOHN HATZISTERGOS: You also have magistrates?

Justice KELLAM: We also have half a dozen magistrates.

The Hon. PETER BREEN: Overall how many members are there?

Justice KELLAM: We have 38 full-time members and we have about 150 part-time members. The part-timers vary. Some of them will come in once a year. For instance, we have a man who is a coastal engineer. So, if planning is doing a case involving a marina or a wharf, he will come into that. Some of our part-timers are very specialised experts. Others come in three days a week. One of the very significant advantages the tribunal has had with part-time membership is the capacity to use women. Forty per cent of our members are women. Part-time membership is very attractive to women barristers at a certain stage of their careers, usually when they have domestic obligations. That has been a good source of highly skilled lawyers working part-time for us that I think we would not have got if we had concentrated on a full-time membership.

The Hon. PETER BREEN: Is there ever any problem with complainants saying, "This particular member works in a certain law firm and they specialise in a particular area of work and that kind of work relates to my claim, why can I not get another member?"

Justice KELLAM: No. I have not had that problem. We are fairly careful to try to avoid conflicts when we can, but we have not had that problem. I find the community in small claims are pretty accepting of the decisions that are made. Actually, that is one other example of a large organisation. Before the commencement of VCAT those separate tribunals did not have any record kept of their proceedings. I was particularly concerned about residential tenancy and civil claims. They are open to the public, but no-one was there in those very small rooms. We got digital recording put in. So, we now have a record of those proceedings. The volume of complaints dropped dramatically once we had them recorded. I think there were two focuses to that: first, the public knew, because we have signs up, that a record was being kept and I think also the members knew too. But, we do not have really a high level of difficulty about conflict with the part-timers. Occasionally we do in planning. Planning is a very difficult jurisdiction for a variety of reasons. We do have trouble there getting outsiders who can sit part time who can avoid conflict. But in terms of the lawyers, we do not

have much trouble. We have a lot of barristers and a lot of women barristers. There really are not too many conflicts with them.

The Hon. PETER BREEN: New South Wales had a problem with District Court part-time judges who came from law firms that specialise in particular areas such as insurance, and for some reason sitting on insurance cases just did not seem to be appropriate. You do not have those sorts of problems?

Justice KELLAM: The tribunal does not have that problem, no. We do not have all that many I should say who are partners in law firms. They are nearly all either barristers or single practitioners. We have solicitors or barristers in the small claims. We have very few partners.

The Hon. PETER BREEN: Solicitors who are sole practitioners generally would be specialists in particular areas, that is probably why you choose them as members of the tribunal?

Justice KELLAM: That is right, yes.

CHAIR: In the development of the amalgam many disparate tribunals must have been coming together, some small and some large?

Justice KELLAM: Yes.

CHAIR: Did that cause any difficulties trying to meld so many disparate groups?

Justice KELLAM: Yes, I think it did. I think the first real difficulty was that there was a self-perceived hierarchy, if you like. It would be fair to say that the AAT perceived itself as the pinnacle of tribunals and had a view that small claims and residential tenancies perhaps were at the other end of that pinnacle. Arguments were advanced to the Attorney General at the time of the amalgamation to say that there was a hierarchy and that it was inappropriate to combine these tribunals; some work was more important than others. For instance, the anti-discrimination tribunal advanced arguments that it was involved with human rights and, therefore, its issues were far more significant than anyone else's. My answer is that throwing somebody out of their flat is a pretty significant interference with their human rights. It is probably impossible to find a more significant interference with human rights than the functions performed by guardianship. So, I do not accept hierarchy of either importance of work or otherwise. But those issues were certainly there and were perceived.

VCAT has a hierarchical structure. One thing I did not tell you about was the pay levels. I think we had 15 separate pay levels spread across the tribunals. Of course, some of those pay levels were from private negotiations. One member had one deal. Those sorts of things had gone on in the past. Soon after VCAT commenced we got that all co-ordinated and now every sessional member gets paid the same, and every member gets paid the same, everything senior member gets paid the same and every deputy president gets paid the same. There are four levels of pay at that point. I think there was some unhappiness about that in some parts of the tribunal because it was this perception "that the work I do is much more important than the work you do". I think that has broken down bit by bit first as the culture has changed—we have only been going three years—and second as the more skilled members have been merged across the jurisdictions.

So, really what we have done is that we have found the very best members of residential tenancy. In fact, there are some very good lawyers there and we have given them an opportunity to sit in domestic building, retail tenancy, guardianship, and bit by bit there has been a merging of those skills and I think that particular cultural problem will go. I think that was the major one. That was a really difficult stumbling block, but they were the sort of internal politics of the merger. Bit by bit internally we have moved people around in their rooms. We have the whole thing in one building now, which we did not have previously. The other thing that I have done that I think was fairly significant is rotated the deputy presidents. I take the view that the deputy president in effect is the manager of the jurisdiction. So, we have a deputy president in charge of the lists, we have a deputy president in charge of planning, we have a deputy president in charge of small claims—we call it civil claims—and a deputy president in charge of residential tenancy.

So, each of those jurisdictions is headed by a deputy president who reports to the divisional head, the County Court judge. When we started, the deputy presidents were the former presidents. So, the deputy president in charge of guardianship was the former president of the guardianship tribunal and the deputy president in charge of residential tenancies was the former chairperson of the residential tenancies tribunal. That continued for 18 months. Last year I rotated them, moved them around, and gave them different responsibilities. I think that has broken down that issue. We had some trouble, some conflict with staff. For instance, guardianship had its own self-contained building in another suburb. It had a very small staff. We have 140 of our staff and I suppose that group of people were 10 to a dozen and they were very unhappy about being merged into this large staff. But I think as we have tried to specialise the registry and get people trained up in their specific areas think we have overcome that too. Again, we have rotated people. We are trying to multiskill registry staff so that many of them can handle several jurisdictions. We are breaking that down bit by bit. Certainly there were real difficulties, the ones you have raised, in those two areas.

CHAIR: The guardianship jurisdiction you are talking about, is that broadly analogous to the Guardianship Tribunal in New South Wales?

Justice KELLAM: Yes. It is very similar indeed. We have a Public Advocate, as you do, and the guardianship list makes decisions appointing administrators and guardians.

CHAIR: Has there been any tendency or any danger of there being a decline in expertise in those various lists?

Justice KELLAM: That was one of the concerns expressed beforehand, and I think you have to be pretty vigilant about that. We have been vigilant about it. I will not allocate people to that list unless I am satisfied they have the capacity and the expertise. In fact, the Act says they are not to be allocated unless they have the requisite skills. Quite obviously, you have to train people and, if I have taken somebody from another jurisdiction and put them into guardianship, I have had them sit with a guardianship member until we are happy they have the skills. A lot of care has to be taken about that because that is one of the benefits of a tribunal over a court, that it has an expert approach to a particular issue. But I think if you are careful and vigilant about it you do not reduce to the lowest common denominator.

CHAIR: So, you would not agree with the argument that there are diseconomies with a large tribunal, that you get more problems than you get benefits?

Justice KELLAM: No, I do not agree with that at all. Some numbers mean nothing, I suppose, but we can demonstrate quite clearly that the cost per case is dropping each year. Our overall costs are not going up at the rate of the increase of work. But, as I say, you have to be careful that is not accompanied by a drop in standards too. I am sure that is a reflection, first of all, of the benefits of scale in terms of registry, the sort of investment you can make in infrastructure. I mean, the electronic lodging I told you about cost nearly $1 million to develop but we will get that electronic lodging into other areas of the tribunal. The benefits of that which came out of residential tenancy will be able to be expanded elsewhere, even into quite small areas. Undoubtedly we will get electronic lodging for the small claims area fairly soon. That sort of spending would not have been justified for 5,000 cases per year. So, there are those economies.

The other economies are—and you have to get the right people for this—that we now have a very sophisticated listing process. It is all computerised. We know where everybody is, what every room is doing, and there are significant economies in that. But you have to have someone running that listing process who understands the special requirements and the special case, and gets the right person to hear it.

CHAIR: One of the problems that has been put to us about having a broad amalgam is that you get effectively both an original and a review jurisdiction operating in the same body. In practical terms has that been a problem for VCAT?

Justice KELLAM: No. That was an issue raised at the start, and we have them functionally separated by the Act. We do tend to have not so many cross the boundaries between the two. People who sit in a variety of jurisdictions tend to do it either in the civil division or in the administrative

review division. That is fair to say. We now have lawyers who will do freedom of information cases as well as the occupational business discipline type faces, and they are all in the administrative area, so we do tend to have our members staying in their areas. On the other hand, there are plenty of members who will sit in credit one day, which is a civil area, and do a freedom of information case the next day. I do not see any practical difficulty about it. I really do think that in career prospects for tribunal members, to have some variety is significant. Whilst it is true that a tribunal should have people who are very expert devoting themselves to a defined area, such as guardianship or retail tenancies, whilst you want to have a high level of skills there, I think there is also a lot to be said for that person being able to spend some time sitting in a different discipline, a different jurisdiction.

CHAIR: On balance you would have thought that by having a wider career path, you would be likely to attract a better standard or a better calibre of member rather than having them slotted into one very specific task forever or for as long as their term lasts?

Justice KELLAM: I believe that is right. I think that proposition is inarguable in terms of the quality of part-time members we have been able to get to come to the tribunal. I mentioned women. We have some young women who have been very successful commercial law practitioners at the bar but they do not want to be doing the ANZ bank case for six weeks, because it does not fit in with this stage of their lives, and they work in all sorts of jurisdictions. I do not think most such people would have been attracted by the smaller tribunal. They were attracted, to be fair, by what might be regarded as the boutique tribunals. Guardianship has never had any difficulty in getting good quality people to do part-time work. Guardianship and anti-discrimination are both areas that have attracted members of the bar. Both tribunals had silks on them who were prepared to do, basically, their public duty.

CHAIR: Can you import some of those to New South Wales?

Justice KELLAM: We pay a silk $450 a day. We have one who you would know well up here who does tax cases in the High Court, and he will come and do a tax case for us once or twice a year and refuse to send us a bill for the $450. Guardianship has traditionally had a number of leaders at the bar amongst its membership—this is well before the amalgamation—and those people are now part of the broader organisation and are still prepared to come. That said, putting aside that issue, I think the opportunity to work in a variety of different areas, and I think to some degree the more certainty of reappointment if you do your job well in a larger organisation, is attracting a better class applicant.

CHAIR: What is the process to select members and appoint them?

Justice KELLAM: Well, previously it was a very ad hoc arrangement. What we have done is that I have achieved this protocol with the Attorney which involves an agreement that a member of the department and me or one of the other judges will interview anyone who is seeking reappointment and then a recommendation will be made to the Attorney by the department, the person who sits in that process. I would rather like to have a better process than this. I should also say that from time to time we have advertised. Last year we advertised for planning members. At the very commencement of VCAT we advertised for general members and then those applications were sorted into a short list by the department. I got hold of the short list and we went through them. It is a slightly unsatisfactory process because it depends upon the Attorney. It is an ad hoc arrangement made with whatever Attorney is presently there.

One of the proposals advanced in the discussion paper "Tribunals: A Principled Approach" was that there should be a tribunal council or, in effect, an ARC. That was not capable of being achieved, as I understand it, for political reasons. I think there is a lot to be said for that. We are left with an ad hoc arrangement. One of the proposals was that the tribunal council would take some of the responsibility of sorting out who should be reappointed and make recommendations to the Attorney. I thought there was a lot to be said for that. I thought that proposal in the discussion paper had merit. I would like to see a more formalised, transparent process than the one we have now. But I think the one we have now is better than what went before.

Mr KERR: But in relation to the Guardianship Board, judge, has there been any controversy relating to the Guardianship Board in Victoria?

Justice KELLAM: The Guardianship Board in Victoria was created in 1986. When it was first created I think it is fair to say it aimed to be very informal. To some degree I think that informality got it into trouble in natural justice issues which got themselves into the Supreme Court. It was not an uncommon matter for the old Guardianship Board in the 1980s to be the subject of stringent criticism from the Supreme Court.

Mr KERR: And adverse findings, I take it?

Justice KELLAM: Yes, mostly about natural justice. I think that changed throughout the 1990s and I am proud to say that guardianship has not been the subject of an appeal since it has been a VCAT. To be fair, it was also not the subject of too many appeals in several years previous to that—to the Supreme Court, that is. One issue that concerned me—and I might say that as a silk I had a personal injuries practice and acted for people who had brain damage and ended up being customers, if you like, of guardianship, so I have had a long-term interest in protection issues—about the creation of VCAT and bringing in guardianship was the loss of its de novo review appeal process. Previously our Guardianship Board was capable of being reviewed by the old AAT, but we brought the old AAT and the Guardianship Board into the same organisation, so that loss of merit review by the AAT was a matter of concern.

We solved that. This is the one place in VCAT where we have a two-tiered review. Anyone who has a decision made affecting them in the guardianship list is entitled to seek a review. The way we did it was to use the hierarchical nature. So, if a member made the decision, that would be reviewed by a senior member. If a senior member made the decision, that would be reviewed by a deputy president. If a deputy president made the decision, that would be reviewed by one of the judges. I think that has cured the problem of the loss of that review. Guardianship, unlike planning, is never in the newspapers, and that suits me fine. I think there is a lot to be said for freedom of the press but to not see guardianship on the front page of the newspapers means we are doing a pretty good job.

Mr KERR: It would be a matter of public record, the senior counsel who make themselves available to assist with the Guardianship Board. Who are they? Is there anybody who does it on a regular basis?

Justice KELLAM: Yes. I would think we have two silks in guardianship at the moment and one of them will come down almost any time for the hard case.

Mr KERR: Who are those two?

Justice KELLAM: Michael Colbran is one, and a fellow called O'Brien. That has been a tradition. Michael Adams, the former Chief Magistrate in Victoria, was a member of the Guardianship Board before he was appointed to that position.

Mr KERR: Are you aware there is a parliamentary inquiry into the New South Wales Guardianship Board at the present time?

Justice KELLAM: No.

Mr KERR: In private practice at the bar what were your areas? I think you mentioned personal injury. Were there others?

Justice KELLAM: I acted for medical defence organisations. I also had a retainer to a couple of pharmaceutical companies and I had a plaintiff practice, acting for quadriplegics and people with brain damage. It was a personal injuries, product liability, professional negligence type practice.

Mr KERR: But planning was new to you?

Justice KELLAM: Absolutely. Planning is the one area that I would raise a question mark as to whether it was appropriate to be merged, because it is so different. You are dealing with policy rather than law, and you are also dealing with politics. The other thing that is of concern about perception is that many people in Victoria would think that VCAT is a planning tribunal, when in fact

it does 3,000 planning cases a year and 87,000 others. We have the same issues as you have. It is all about urban consolidation, and it is in the same suburbs: your Paddington is our Prahran.

CHAIR: One of the provisions in your Act says that judicial members have a statutory obligation for the training, education and professional development of members of the tribunal. I would be interested to know a little more about that, how it works, and what are its advantages and disadvantages.

Justice KELLAM: It has been an advantage to have that in the statute. If you read the annual reports, I think you will see I have raised issues of concern each year about the funding for professional training. It has been an advantage to have it in the statute because I have been able to go to the department and say, "Look, we have a statutory obligation, and this year in my report I will be saying we are not fulfilling it because of the funding." So I think it is a very good thing to have in the statute.

I think this is another advantage of a big tribunal, I must say, because you can do it in a more sophisticated way once you get the funding. You can even do it without funding, in a way. If the place is big enough with enough skills to be brought together, you can run a seminar for nothing using your own skills. But I think professional training and education is a significant matter. It is more significant, I think, for a tribunal than it is for a court. You are using part-timers, you do have legislation which changes, and I think you often have people sitting there who have not had the length of career that people have had when they get to courts.

I am President of the AIJA and am very supportive of judicial training, too, so I am not putting it down. But in terms of the importance of it, I think it is absolutely critical to running a tribunal. I think to have the obligation in the statute is a very good idea, because it makes it easier to deal with bureaucrats if you have a clear statutory obligation, than just saying to the department, "Look, I would like to run a seminar." At least now I can turn to the Act and say, "I have to run a seminar." So I am very supportive of keeping that in the legislation.

Mr KERR: What is the AIJA?

Justice KELLAM: The Australian Institute of Judicial Administration. That organisation has been actively involved in trying to get a national judicial college established to enhance judicial education. I want to make it clear that I am not saying judges do not need to be educated, but tribunal members equally do.

CHAIR: What is the position about legal representation before VCAT? Earlier you said that in a couple of the divisions it is only by leave. Is that the case across the entire tribunal?

Justice KELLAM: No. The Act in fact provides that unless you fall into a certain number of categories, such as an infant disability, representation is by leave. The government at the time was very keen to try to keep lawyers out of the process as much as possible. But we found that that was pretty unworkable in some areas because, despite the government's interest in keeping lawyers out, they would turn up with a bank of silks in every freedom of information application. Some areas just do not suit, so we have enforced that, and we have made it quite clear by a practice note that in those two jurisdictions you will not get leave unless you have a pretty good reason why you should. But we have said that in other areas leave will be granted as of course. So that in freedom of information, planning, and those sorts of areas, we do let people have representation. It is not always lawyers, though. In planning, the person who is representing might be a town planner, or an engineer, or whatever, so we spread the representation around. But it is very difficult to deny people representation in certain areas.

People are rarely represented in guardianship. On the other hand, that is a place where we would almost invariably give leave. Most people are not represented, although they do have the assistance of the public advocate, they also have the assistance—perhaps I should also tell you this. We have recently received funding, and it will be starting next month. We are going to have a duty lawyer scheme at VCAT. We are not talking about a duty advocate; we are talking about a duty lawyer who would provide advice to people. I think that that is a necessary thing, even in areas where we will not let the lawyers in—in fact, perhaps particularly so in those areas.

Many tenants do not speak English well, or have other difficulties of access. I think an advice centre of that sort would be a good thing. It is going to be in the building, it will be at the front door, but it is distinct from us. Right now our staff, and to some degree our members, end up giving advice to people. It will plainly have "Victoria Legal Aid" on the door. I think that is an important thing, and I am glad we have achieved that. I suppose that is one of the benefits of the bigger tribunal, although I know you have it in your Anti-Discrimination Tribunal.

CHAIR: One of the things that has activated the minds of some of us here is that if you have the lawyers out, in areas such as the residential jurisdiction, where landlords are almost represented by agents who are there every day, there is a clear imbalance in the skills and capacities of the parties to present their arguments.

Justice KELLAM: That is so. The old credit tribunal is part of our business. Very often that will deal with credit contracts that have come to grief for whatever reason. The people who turn up from the finance company may not be lawyers, but they are very sophisticated; they know their contract back to front and they know the credit code back to front. So, in some ways keeping lawyers out disadvantages the public.

CHAIR: The issue is not whether or not you have lawyers in, but how each party presents its case, and once you have worked out what that position is, then you work out whether the lawyers should be there or not.

Justice KELLAM: Yes. Although, I would be pretty resistant about having lawyers in the small claims and residential tenancies, because I think our skilled members can try to sort things out. The trouble with lawyers is that they will always want to try to get pleadings and complicate the process. There are some areas where lawyers have to be; I think that is inarguable. I think retail tenancies is one such area. You are talking about a lot of money—say, a large shop in a big shopping centre and a complicated lease. I think you have to face up to the fact that you will have to have some sort of pleadings, you will have to have some sort of process of setting out what the client is about, and it is appropriate that lawyers are involved. On the other hand, I do not think lawyers should be involved in cases like the stained wedding dress at the laundry. I think the lady who owns the dress and the laundry operator ought to be able to come around a table with a skilled person and try to sort the issue out.

CHAIR: Most lawyers probably would not want to know anything about it as well?

Justice KELLAM: No, but a lot of those small cases do take place in the magistrate's court. A $3,000 case running up $5,000 in fees is still pretty common.

The Hon. PETER BREEN: Do you have strict rules about pleading? Do you have to plead to the issues, for example?

Justice KELLAM: No. We basically have no pleading rules. We will have a set of practice notes about what particulars are to be provided. More focus will be given to this in some areas. For instance, in our domestic building area there will be a directions hearing and there will be a requirement for a list of defects, for instance. So there is some process there, and they will be required to give further and better particulars of the contract or the conversation. So that area would resemble a court process in terms of pleadings. With retail tenancies, you just do not have any choice but to have, in effect, a pleading process.

But apart from those areas, we try not to have pleadings; we try to have people write out statements about what they say the issues are, and try to have our members sort out the chaff from the wheat. It is a fine line. You have to provide procedural fairness to the other side so that they know the case they are going to meet and they know what the issues are, and at the same time you want to balance that with not making life so impossible that the man or woman in the street feels oppressed by it. There is a balance there; getting it right is the trick.

CHAIR: Do you have a rules committee for VCAT?

Justice KELLAM: Yes, we do. The rules committee, you will find in the Act, was set up by the Act. It was really the pale creature that emanated instead of the proposed tribunal council. If you like, that was the end of the political process: the rules committee came in.

I do not think the rules committee has been a wonderful success. It has the responsibility for the rules; it has the responsibility also for the training and management of professional education. It has the judges, it has on it a representative of the membership of the tribunal who is not a lawyer, and it has a number of outside appointees.

I think it is a wonderful idea, but for functions other than rules. The trouble ends up being that, in terms of the rule-making function, it is the judges who have a full understanding of the rules, and to some degree it is the three of us who really decide what the rules are. We have some very good people who will comment on it. We have Crown Counsel on it, Professor Sallmann, we have a lady who is a partner of one of the big law firms also on it, and they will comment about the drafting, but they really do not understand the process or why we want this rule. So I am not convinced that that is the way to go about rules. I think it would be better to have a larger corporate body preparing the rules.

That said, I think there is a function for outsiders to be involved in management of the place, and the rules committee that was designed by that statute does not meet either. It is not really a governing council. It is called a rules committee. One of its responsibilities is to create the rules. I do not think what was wanted was really achieved there. I think it would be better to have an administrative review council, or a tribunal council, or whatever you want to call it, that has representatives of government, perhaps representatives of the bureaucracy, and representatives of outside stakeholders who would be involved to some degree in the appointment process, the reappointment process, and who would be involved in corporate management to some degree. I do not think we got it quite right with this. That said, we do have a rules committee, they are its functions, but it does not go much beyond that.

CHAIR: Has the jurisdiction of VCAT changed much since it was established?

Justice KELLAM: It has not changed a great deal; it has broadened, though. We have picked up new jurisdictions; we have picked up retail tenancies. The Fair Trading Act has now come in. There is a significant increase in the number of disciplinary business regulation and professional regulation functions. So it has expanded, but not changed.

I might say, it has decreased in some areas. The number of cases coming in has not necessarily decreased, but mediation and dispute resolution has altered the focus of sittings. With regard to antidiscrimination, the old tribunal did not mediate anything, and there was a reason for that. Complaints are made to the Equal Opportunity Commission. It would conciliate them; if the conciliation failed, it went to the tribunal. The view was taken that conciliation has been tried. I took a quite different view from that. I took the view that the conciliation was step one and we would have step two. Eighty per cent of those cases are now resolved by mediation and not heard. So in fact the number of members required to make decisions in antidiscrimination has shrunk because not many cases are getting through to the keeper. On the other hand, the requirement for the operation of the mediation has increased.

The Hon. PETER BREEN: Judge, could you indicate whether you have a view, in the context of rules, about the idea that we might have a charter of rights or statement of principles that consumers could hang a hat on to say, "This is where I go to assert this principle"? I ask the question in the context that we do not really have a Bill of Rights or other statement of basic principles that people can rely on or refer to.

Justice KELLAM: I suppose that is what our Fair Trading Act tries to do in its own way. In terms of enforcement, a statement of principles is one thing but if it does not get things enforced that is the difficulty. But at the same time I think our Fair Trading Act has tried to say what the principles are and what is expected of those dealing with consumers. But our problem is when the complaint comes. It might have breached the statement but what do you do to enforce it? That is the problem I see with that.

The Hon. PETER BREEN: Would it benefit people from the point of view of access to justice, even if it is only a perception, to think that here is an organisation that has certain basic principles that are up on the wall and I can read them?

Justice KELLAM: Yes. We have a users charter, which is not quite what you are talking about. You will see it in our annual report. It states what we expect of ourselves. That is presented to the public and is on the wall in the registry. I think that all courts and tribunals have a lot more work to do on that. If you are interested in looking at that in more detail, the AIJA published a report by Professor Stephen Parker about two years ago called "The Courts and the Public". It deals with a number of these perception issues.

The Hon. PETER BREEN: Yes, I have read that report. It is a very good report.

Justice KELLAM: That is down the track you are going down. All of us have more work to do but we have got a users charter. We have tried to set up a more satisfactory way of dealing with complaints that is more transparent. I think that there is a lot of work to be done in all of those areas.

CHAIR: In some of the material you sent to us there was a paper you gave in November last year. You suggested that the distinction between civil and administrative tribunals that had previously existed had been blurred and that, flowing on from the establishment of VCAT, administrative review functions were now seen as quasi-judicial rather than administrative. Is that more than a perception? Is it the reality, and what consequences might flow from that?

Justice KELLAM: I think no consequences flow from it. The Commonwealth situation is different—the engineers case—and what is an administrative function and what is not? Arguably, if some decisions of VCAT ended up in the High Court the High Court would say, "This was clearly an administrative function and not a judicial one." But I think in the end that is a matter of interest to academics.

CHAIR: Unless the High Court keeps telling State tribunals they have more and more Federal jurisdiction and therefore they become bound by some of those Federal precepts.

Justice KELLAM: Yes. But we do not. We are a State tribunal. We do not have any Federal jurisdiction. In the end result I think it matters not to the person who wants his file from the hospital whether it is an administrative function we have exercised or a judicial one. That was really what I meant. In terms of our day-to-day life of decision-making, the functions are blurred quite dramatically by having a Civil Division and an Administrative Division. I suppose in the old days—in 1984 when the AAT was formed in Victoria, and it was a copy of the Federal AAT—one could have said that all of its functions were administrative in the Commonwealth constitutional model. But now, there is a blurring of these functions. Appeals use to go from the Medical Board to the Supreme Court as a de novo review by the Supreme Court. We now perform that function. I think it would have been said that when the Supreme Court was performing that function it was performing a judicial function. But in the end result I do not think it matters much. I think it is a matter of academic nicety. That was really what I meant by that statement. Those niceties do not affect us in our day-to-day work. I hope our people try to make good decisions based upon principles of natural justice and do not sit there thinking, "Am I making a judicial decision or and administrative decision?" I think it has got to be a bit irrelevant but it is very nice for the High Court and academics.

(The witness withdrew)

NICHOLOS KEVIN FRANCIS ONEILL, President, Guardianship Tribunal of New South Wales of 2A Rowntree Street, Balmain, affirmed as under:

CHAIR: Did you receive a summons issued under my hand to attend before the Committee?

Mr O'NEILL: Yes, I did.

CHAIR: The Committee has received a response from you to its discussion paper. Do you wish that that paper be made public and included as part of your sworn evidence?

Mr O'NEILL: Yes.

CHAIR: Do you wish to make an opening statement?

Mr O'NEILL: Yes. I want to correct a matter on the record. Mr Kerr stated that there was a parliamentary inquiry into the Guardianship Tribunal, of which I am the President. There is no such inquiry. The inquiry to which I think Mr Kerr was referring relates the inquiry of the Public Bodies Review Committee into the Office of the Public Guardian and the Office of the Protective Commissioner, and not the Guardianship Tribunal.

I ask the Committee to consider what is the problem that is to be dealt with here? I suggest that no problem has, in fact, been identified in relation to at least the situation with the larger tribunals in New South Wales. It has not been part of the inquiry, which is perfectly understandable, to go into this matter. I refer briefly to the nature of the tribunals in New South Wales. Many of them have different roles and have developed specialist skills and experience. Some of the tribunals are very well established with very large workloads, and well established practices and procedures relevant to their roles. They have experienced members and they use their resources very efficiently. Perhaps there is a need to hear from more of them, although I have been given the advantage of some material from some of them. There is a real issue for the Committee in considering what it might recommend with the issue of "Well, if they ain't broke, they don't need to be fixed" because if you do go through a process of amalgamation you have to put in an inordinate amount of time dealing with that process.

Justice Kellam came on board with VCAT at a time when the new body had been set up, but there had been some years of preparation and very considerable difficulties for the tribunals involved in that amalgamation process before Justice Kellam came. Let me say that I think that VCAT is very lucky to have Justice Kellam as its first leader. I have had the pleasure of discussing matters with him on a number of occasions. I am also aware of the very great concerns that exist in the Commonwealth tribunals that have been considered for amalgamation. The process there which has not been brought to a conclusion, and would seem to now be on the back burner until after the next Federal election, is a process which has caused great difficulties in the ongoing operations of those tribunals, and a great deal of difficulty for morale and work performance.

It is a difficult matter to achieve and there really have to be strong reasons before one goes through an amalgamation process of all of the tribunals within a jurisdiction. But there may be room for some forms of amalgamation but, I suggest, that the Committee takes up those matters with others. For example, one could see an argument for disciplinary bodies of particular professions being put together but I must say I do not know all of the issues relating to that matter and if that were to be considered, I would suggest to the Committee that it takes evidence from relevant people so that the Committee is fully informed on the issues that would be relevant before it makes a recommendation along those lines. I think the Committee is aware of a paper that I gave at the fourth Australian Institute of Judicial Administration Tribunal conference in June this year in Sydney called "Tribunals—They Need to be Different". I would be happy for that paper to form part of the record of the Committee if the Committee so wished.

CHAIR: Yes, we will include that in the material that you have tabled.

Mr O'NEILL: That paper takes the Committee through the very different range of tribunals, and points out that they are quite disparate. Their roles are very different. Some are very court-like bodies which resolve disputes between two relatively equal parties and others deal with remuneration,

price-fixing issues, victims compensation issues and then in the more socially different areas of guardianship and financial management, as well as in the area of mental health, a review of whether people who are mentally ill should remain within the confines of the mental hospital. There is a huge range of different sorts of tribunals, all of which need to and have developed different ways of proceeding.

It is also wise to recall, before recommending amalgamation, why the different tribunals were set up in the first place because I think, as I have suggested to you, that that indicates that there were good reasons for doing so and I suggest that those reasons remain good. I invite the Committee to check those issues before it makes the recommendations. I think a lot of tribunals were set up for very different reasons, which explains why they are different. In my view they need to continue to be different. One of the problems that exists—I am aware that VCAT has kept some of the differences—is that there is very great pressure on tribunals when they are amalgamated to adopt a particular approach. It is one of the initial recommendations, if you like, or one of the proposals that the Committee put out in its discussion paper, that is, the idea of going down this track of developing sameness. I think if that occurred it would be a great shame because a tribunal would lose its ability to operate in the way it needs to carry out its particular and different functions.

For example, the way that the Residential Tribunal operates, that is, dealing with matters between two people very quickly, zeroing in on the issues, determining in which direction it will go if the people will not agree to a consent outcome, is very different from the way, for example, the Guardianship Tribunal needs to operate. On a number of occasions the Guardianship Tribunal deals with a situation where a family is in conflict and it has to tailor the way it operates to bring about the right outcome for the person with a disability—because that is our primary obligation, as set out in our Act not only under principles in section 4 but elsewhere—but we also have to make sure that that person's relationships with their family can continue as best possible, unless it is very definitely against their interests that they have relationships with family members.

So there are very different sorts of considerations that the different sorts of tribunals have to deal with and they have to mould their conduct accordingly, and pressure to force homogenisation of their processes will work very much against the way tribunals need to operate. Their needs to be a very clear understanding of that sort of issue. I would continue to suggest to the Committee that the reasons why tribunals were setup was to make sure that things were done differently to the way they are done in courts, and that they have to be different from one another. I suspect I am talking to an audience largely made up of lawyers?

CHAIR: I am sorry if that impression is so obvious. We have one teacher on the Committee.

Mr O'NEILL: I hope what I am saying will strike you, Mr Smith, more strongly perhaps from the others. But there is the need to get away from lawyers, which is one of the reasons why tribunals were setup to move from a court-based system where basically to get your issues before the court you really needed to work through a lawyer. It is interesting that the Australian Institute of Judicial Administration has recently put out paper that deals with this very issue. The way it is written bemoans the difficulties of dealing with unrepresented applicants before courts and tribunals. It emphasises that it is about tribunals as well. One of the great strengths of the tribunal system, and one of the things that makes tribunals more accessible than courts, is that one does not need a lawyer on most occasions to go before a tribunal. There are occasions where one does need a lawyer and tribunals like my own have processes to ensure that when lawyers are needed, leave is given for them to attend. Accessibility and the absence of lawyers are the things that, in fact, go together.

It is very important that that concept be given very great credence because the Guardianship Tribunal needs to be able to take applications from family members, from family doctors and from service providers. They are the people who make the overwhelming majority of applications to us. They need to be able to come before us and bring the evidence. They need to satisfy us as to whether or not a person has lost capacity and does need either a guardian or financial manager. They need to be able to do that without the need for a lawyer because the system will not work in the other way. One of the reasons that the tribunal was set up was because of the difficulty in getting access to people with authority to make decisions that a person has lost capacity and to appoint a substitute decision-maker for them, which is the role of a guardian in relation to personal decision making and a financial

manager or administrator, as they call them in Victoria, in relation to financial matters. Those things are very important.

I also have concerns and would like to suggest to you that if you have judicial leadership this represents an element of recapture of the system by the lawyers. It will lead to the inevitable relegalisation of such tribunals. What is my evidence for that? It is not helped in a sense by the approach of Justice Kellam, who seems very open to the sorts of problems that I perceive. Let us bear in mind that judges have usually had their whole careers in courts and have become eminent because of their ability to deal with that system. They will not be wanting to think particularly laterally about tribunals and be all that keen to free them from legal formality.

You have rules committees to make practices and procedures more similar. There are naturally forces in place, which will lead to the relegalisation. There are also grounds for concern about the key role of expert members of tribunals. The great strength of the Guardianship Tribunal of New South Wales lies in its professional members, who are experts with experience in the assessment and treatment of people with disabilities and what we call our community members, who are experts with experience of people with disabilities. They bring the real knowledge and information that the tribunal needs to have in order to question people, access the evidence and make decisions in the best interests of the person with the disability.

I have seen in the 12 years that I have been a member of the Guardianship Tribunal some of the best questioning work and legal understanding work coming from the non-legal members. I have a strong sense from what I have observed happening in the old Guardianship Tribunal of Victoria and elsewhere of the reduced appreciation of the importance of the role of the non-legal experts and I would be very concerned about that issue. If there was to be an amalgamation it would have to be legislatively guaranteed because it is fundamental to the Guardianship Tribunal and I would submit it would be fundamental to a tribunal such as the Mental Health Tribunal where psychiatrists and the third member play an important role.

I have touched upon accessibility and I will not go through that any further. Loss of identity is also a big problem. The Guardianship Tribunal has put a lot of effort in the 12 years of its existence into community education and we have taken all the steps that have been taken in VCAT in terms of the web site. Each year we run community education days around the State and we continue to respond to invitations from a wide range of groups to give presentations to them. We have concentrated on people who are likely to be dealing with people with disabilities so that they know as part of their professional work about the Guardianship Tribunal, what it can do and what it cannot do.

We have also taken the lead in promoting alternatives to guardianship and financial management. We were responsible for getting the legislation through to introduce the concept of enduring guardianship, where a person can appoint their own guardian and set out in a document like an enduring power of attorney what functions they are to carry out should the person themselves lose capacity. We also strongly promote enduring powers of attorney. We are delighted that other organisations are taking up our challenge to take these issues forward. The Public Guardian, the Benevolent Society, the Alzheimer's Association and various other groups are working on this. We have played a major role in informing those necessary about our work.

Although our community education is aimed at professionals in the health areas, every time we run a community education day involving such people, part of the day is for the professionals and the other part of the day is for family members where we invite members of families of people with disabilities to come along and hear about the tribunal.

There are real managerial problems that lead to the diseconomies of large scale. It is very difficult to operate a very large system in a way that ensures that everything is done well. You have heard what Justice Kellam said about Victoria and obviously a number of the issues are being addressed there. Training of tribunal members is an important issue as well and there are great difficulties in putting the operation together. Unless you have a tremendous amount of success in doing that, you can have systems where there are constant clashes. The fact that it may have been achieved successfully in one place does not mean it is achieved successfully elsewhere. You have to make sure that you have in your leadership people who are good managers and who are very

committed to having a system that really works and who are capable of putting together a big operation and to keep it running.

I would suggest to you that the better way to go is to recommend further co-operation between the tribunals of this State and a form of committee or council of tribunals. We have discussed this matter informally on a number of occasions and I would be happy to see things go that way. I would certainly remind you that that was the way that the Commonwealth was going in the first eight chapters of the report called "Better Decisions", which led to the proposal for amalgamation. There was a sudden change in chapter 9, co-operation, and a whole series of recommendations as to co-operation occurred in the first eight chapters. I think the person who wrote those chapters moved away and some other group took over because there was a complete reversal.

We also must be aware that there are some areas where co-operation will be successful and there are other areas where the tribunals need to continue to be different. There is the possibility of shared hearing rooms but the Guardianship Tribunal sits in a range of different locations all around the State. We avoid courthouses because often we are dealing with the matter of an elderly person with dementia and in country towns people do not particularly want to be seen going to courthouses. It can be quite worrying for elderly people who have done nothing wrong to suddenly find themselves in courthouse. We use other locations quite successfully but we would certainly be willing to work with colleague tribunals on such a thing.

There is some training to be done in common. There are some general principles about fairness, awareness of the quality of evidence and notions of staying within jurisdictions but in many other areas the training has to be different. For example, there would be very few members in other parts of an amalgamated tribunal who would be interested in presentations we have had on things like the new proposals for mini-mental examinations, discussion of dental treatment of people with disabilities and the very great importance of that, and information about psychotropic medication. These are important parts of the training program that we have given our members over the years and have a strong commitment to that. We would be able to co-operate on such things as fees and working conditions for members.

They are some of the things I would like to raise with you. I would like to spend a couple of minutes making some comments about submissions that have been made to you. The first is the material from Judge O'Connor relating to the first proposal that you put forward in your discussion paper about merging the separate tribunals. Judge O'Connor's comment does not address the problems of large size and disparate roles. There is also a suggestion that the Attorney General's Department specialises in the provision of support and services to courts and tribunals. That may be so. Certainly that is done in relation to courts but I would suggest to you that many tribunal's need very different locations from courts and an appreciation of the need for them to be different and the way we are set up at the Guardianship Tribunal is very different from the court and is intentionally that way.

There are considerable problems in what is a relatively small tribunal at the moment being asked to be the lead tribunal in an amalgamation of other tribunals which are considerably larger than it, the Guardianship Tribunal being one. In my submission I gave the figures for the year before last for the residential tribunal. I understand that it received 60,000 applications last year and dealt with between 40,000 and 50,000 of them.

Justice Kellam raised some points, including the appointment of members, and I add that we are in the same position. I will explain how that occurred from the beginning with the Guardianship Tribunal through it first Minister, Mrs Virginia Chadwick, formerly a member of the Legislative Council. In the 12 years of the tribunal's operation it has had six Ministers, from each of the major political parties. We have advertised in the press calling for expressions of interest and we cull those expressions and call some in for interview. There is always a large number of good people expressing interest, but we can select only some of them; we interview them and make recommendations to the Minister.

All Ministers have taken the advice offered about appointments. We need a range of expert members and need to make sure that we have people with relevant experience in the areas of the aged, intellectual disability, mental health and various other areas. We must have a strong balance between those areas. We need doctors, social workers, psychologists and other with a strong family experience

with people with disabilities. We need people with a really good knowledge of the services that are available to people over a whole range of disabilities.

We have been able to achieve that very successfully with all Ministers. Access to the Minister is important. My predecessor, Roger West, and I have never had any difficulty with access to our Minister when needed to discuss necessary issues. We report to Parliament, as does VCAT. I am extremely proud of the training program that we have put in place at the tribunal. We have the induction for new members. This afternoon I am returning to the second day of an induction program for some new members.

We have three half-day and one full-day training each year for all members. We have up to four half-days extra training for our presiding members, that is needs based. We have a well established system of training. One concern I have about proposals for amalgamation—and in a sense this occurs in VCAT—is that the tribunal system can finish up simply being a new career for lawyers. Risks would be associated with that, particularly if the ethos develops that it is the lawyers who know it all and the role of other expert members is devalued.

Relatively few expert members sit on VCAT compared to the structure at the Guardianship Tribunal. I refer particularly to the guardianship list. It is very important that whatever happens the strength of the guardianship jurisdiction, with its two experts and a lawyer-presider, remain in place. Justice Kellam referred to the electronic system, and we have an excellent system of electronic management of cases that we bought in a largely developed stage. Amendments have been made to suit our particular needs. The system has been on-sold to our colleague tribunals in Queensland and Tasmania.

CHAIR: What is the structure of the tribunal? What does it consist of when it sits?

Mr O'NEILL: It must sit with at least three members. The presiding members are lawyers who have qualifications sufficient for appointment as judges; they are barristers or solicitors. The Act states that there must be one professional member, that is a doctor, a psychologist or social worker, with experience in the assessment or treatment of adults with disabilities. The tribunal must sit with a community member, that is another expert member with experience with adults with disabilities. Typically that is familial experience, or in some cases personal experience of disability.

CHAIR: Where does the tribunal sit? You said earlier that you were not keen on sitting in courthouses, for reasons that the Committee would understand.

Mr O'NEILL: The tribunal sits in a range of locations including rooms in RSL clubs, community halls, and other places with access for the disabled and with a room for the tribunal to sit in another room for other people to sit. We sit in many different locations, sometimes in the meeting rooms of the old Department of Community Services in some larger country towns. Sometimes we sit in public halls.

CHAIR: How often does the tribunal sit in country areas?

Mr O'NEILL: Approximately 30 per cent of our hearings are conducted outside the Sydney metropolitan area. We have a very good system of sitting in regional areas. We have not set up an ironclad circuit system, as the courts have, but we have a system of returning to places every six to eight weeks, depending on the workload. Also we can deal with matters more quickly by telephone or by videoconferencing, if necessary. We prefer face-to-face hearings because that is the best way to engage a person with a disability and also the family members.

CHAIR: What is the term of appointment for members?

Mr O'NEILL: A maximum of three years, but with the possibility of reappointment. I have been a member of the tribunal since it began. A number of the best members of the tribunal have been there for 12 years. Our present Minister is keen to have a considerable turnover of the members, and that is proceeding. The tribunal has always had turnover. In its first 10 years there was an average of four people per year resigning. At this stage about 37 per cent of its membership has been there for three years or less. We are bringing new people on and other people are moving off.

Our members put a lot of effort into developing their skills and experience on the tribunal and it has been possible to keep people on. There is an ongoing debate as to how long people should be members of tribunals but I do not think that there should be an end date for people who have skills and experience and contribute to the tribunal's work.

CHAIR: Presently is there any restriction on the number of terms of appointment?

Mr O'NEILL: No.

CHAIR: The document you forwarded to the Committee contained the phrase "diseconomies of a large scale". What did you mean by that?

Mr O'NEILL: In creating the right form of co-operation there are great difficulties among members. There are real difficulties in ensuring that staff brought in from different areas are able to co-operate. Staff must appreciate each other's different experiences, backgrounds, and ways of doing things. They must work through to a resolution of agreed ways of doing things. All of that takes considerable time, and did take time in the VCAT. If that management is not successful, it will result in a totally disorganised and very unhappy operation.

The Guardianship Tribunal consists of a good group of people. It has regular staff turnover, no-one is there for ever, but it has good induction, training programs and ethos. As organisations get bigger they need to work much harder on that sort of thing. They need a far greater managerial commitment as they get bigger. Staffing co-operation and membership co-operation is always a big risk. If we are to follow what they did in Victoria—bring everyone into the one building—it would cost at least $1 million for the Guardianship Tribunal, with its present structure, to move.

A move would involve new layout arrangements, a need to pay out or get out of existing leases, a need to work out the shape of the hearing rooms and waiting rooms, and a need to work out the shape of the workrooms for the staff. That will take a lot of time and will cost of fair amount of money. The set-up costs are quite considerable. The reason I refer to the million dollar figure is that we looked at this issue with the view to seeing whether perhaps the Guardianship Tribunal should move further west. It is in Balmain. It is actually quite accessible and we have parking for people coming to hearings in the building, which is highly desired in Balmain these days. So, we did look at the issue of moving and the advice given back to me was that it was at least one million.

The Hon. PETER BREEN: You would save on rent if you moved, would you not?

Mr O'NEILL: No. We have a very good deal.

The Hon. PETER BREEN: Balmain is an expensive place. Parking would be expensive, for example.

CHAIR: To say nothing of public transport.

Mr O'NEILL: We have been there a while. In fact, we renegotiated very successfully and our rent went down and will not be going up for a bit. We have negotiated the rate of increase. But then, we have a fair amount of the building. We are permanently there, but it is a good deal. Elsewhere, further west would be more expensive actually.

CHAIR: One of the other comments you made material suggested that the residential tribunal deals only with relatively uncomplicated disputes.

Mr O'NEILL: I will accept correction on that. I think they deal with a large number of uncomplicated disputes, but I am now aware since I wrote that that they also have some quite complicated matters that go on for some days.

CHAIR: You mentioned earlier that you had some informal discussions with other tribunals. Is there any reason they have not responded to the discussion paper with the same enthusiasm as the Guardianship Tribunal?

Mr O'NEILL: Those are matters for them, I think. What I was referring to was informal discussions about the notion of a council of tribunals. That was what I was meaning, not about this issue.

CHAIR: I would have expected a large number of tribunals to have reacted in exactly the same way as the Guardianship Tribunal, but frankly you are it. It surprises me.

Mr O'NEILL: I think I received material indicating that there were submissions from the harness racing tribunal and other tribunals. I cannot speak for other tribunals but I understand the Fair Trading Tribunal and the residential tribunal are going through a process of amalgamation at this point and that at the moment there is an acting head of the residential tribunal. I think Judge O'Connor is still the head of the Fair Trading Tribunal and they are being amalgamated. Judge O'Connor is in a somewhat difficult position I should imagine, to have strong views on that situation.

I am raising concern because I believe that the matter needs to be debated. My concern arises out of the idea that there seems to be a movement to amalgamation without any consideration of whether there is actually a problem in the first place that needs to be fixed. I would be suggesting that it is incumbent on those who wish to recommend change to find out the real situation because there are real costs in time, effort and money in bringing about an amalgamation. Unless there is a problem, I do not see the need to change the arrangements in relation to, say, the Guardianship Tribunal because I think we have worked very hard to do all those things that need to be done to have a very well run tribunal.

Mr KERR: You mentioned accessibility to your office.

Mr O'NEILL: Yes.

Mr KERR: What about public transport?

Mr O'NEILL: There are three bus services to Balmain. There is a 10-minute bus service from Town Hall station to the Guardianship Tribunal, but most people who come to hearings, particularly with the person with the disability, come by car and that is the great strength we have. People park right there and it is a very short walk from the parking place to the lift which takes them upstairs. That is one of the reasons for wanting those premises.

Mr KERR: Has the Guardianship Tribunal been involved in any litigation since its creation?

Mr O'NEILL: Do you mean has it been the subject of appeals?

Mr KERR: Yes?

Mr O'NEILL: Yes, there have been appeals. Sixteen in the 12 years it has been operating.

Mr KERR: What has been the outcome?

Mr O'NEILL: The outcome: on virtually every occasion the tribunal's decision has been upheld. On a couple of occasions there were consent orders given by which the matter came back to the tribunal for the hearing. There has been one occasion where the Public Guardian appealed against the Guardianship Tribunal decision to appoint the Public Guardian with certain functions relating to the mental health criminal procedure legislation. In that case the court agreed with the Public Guardian that we could not appoint them as guardian with particular functions. It was a very limited issue. In another matter the tribunal was advised of the judge's view of the powers of the tribunal on review and the matter was sent back to be conducted that way. I believe I am right in saying that in every other case the tribunal's decision was upheld by the court.

Mr KERR: Has the tribunal been subjected to any judicial criticism over that period?

Mr O'NEILL: No. In my view we have not been subjected to criticism. I think if you look at the cases and compare them, say, with what Justice Kellam was referring to, the case known as the

Moore case. The guardianship board of Victoria in its early days was subject to criticism by Justice Gobbo in one case. We have not had that and we are very careful and very committed to fairness. Procedural fairness is a big issue for us. We spend a lot of our training time on that issue, on the quality of evidence issue and, of course, on appreciating the limited extent of our jurisdiction.

The Hon. PETER BREEN: Can you say who the people are that bring claims before the tribunal? Is it the Public Guardian or the Protective Commissioner? I am not familiar with the tribunal.

Mr O'NEILL: The largest group of applicants are members of the family of the person with the disability. I did not bring last year's annual report but the division is set out in there. The next group are service providers, meaning family members, hospital social workers, members of aged care assessment teams, members of community organisations, the people who provide services to people with disabilities. We almost never get applications from either the Public Guardian or the Protective Commissioner, but if there became a situation where we were aware of the need for an application to be made to us and nobody was willing to bring it, then we might ask them to bring it. But that would be their discretion. They do not bring the applications, but if we appoint a guardian or financial manager and the circumstances of the case do not allow for the appointment of a private person as guardian, we will appoint the Public Guardian. If either the circumstances of the case are such or there is no suitable person to be appointed financial manager, then we will appoint the Protective Commissioner.

The Hon. PETER BREEN: I was under a similar misapprehension as Mr Kerr in thinking you were involved in this current review.

Mr O'NEILL: No.

The Hon. PETER BREEN: You have no connection with it at all?

Mr O'NEILL: The review is of those two other organisations that are established under a different ministry. The Protective Commission is established under the Protective Estates Act. The Public Guardian is established as a statutory office actually in a part of the Guardianship Act. There are three separate organisations: the Office of the Public Guardian, the Office of the Protective Commissioner, and the Guardianship Tribunal. You will see from the terms of reference of the public bodies review committee that it is about the other ones and not us.

The Hon. PETER BREEN: You suggested in relation to experts that you would like to see the present situation continue where you had to experts and one legal representative.

Mr O'NEILL: Yes.

The Hon. PETER BREEN: Would you agree that the same scope for allowing experts to sit on the tribunal in the model outlined to the Committee by Justice Kellam as it operates in Victoria would be a satisfactory model to have in New South Wales?

Mr O'NEILL: There are two things: the Victorian model does not insist on the expert membership. We do not want to move away from that because that is the strength of the guardianship tribunal. But it would be essential if there was amalgamation for the statute to be the same as the present statutory provisions about our membership. The second aspect of it is a concern I have of a lack of appreciation among some lawyers of the great importance of the expert membership of the tribunal. If an ethos developed in an amalgamated tribunal in that direction, that would be a very considerable loss.

The Hon. PETER BREEN: Do you agree with the observation of Justice Kellam that the system has worked in Victoria in relation to its guardianship tribunal and that the people who were affected by the decisions of the tribunal are by and large satisfied? I believe he said that there had been no appeals to the court from the tribunal in Victoria.

Mr O'NEILL: The appeals from the Guardianship Tribunal of New South Wales are direct to the Supreme Court. In Victoria one assumes that what Justice Kellam says is correct. It is a matter of some difficulty but the Victorian model is not the model that is followed by the other tribunals. The

lead guardianship tribunal in Australia is the New South Wales tribunal. The new Queensland tribunal is based on the New South Wales model and so is the new guardianship board in Hong Kong.

The Hon. PETER BREEN: What did Victoria have before the current tribunal?

Mr O'NEILL: Before the current guardianship tribunal was established in 1986?

The Hon. PETER BREEN: No, I mean before the current.

Mr O'NEILL: Before it was amalgamated into VCAT?

The Hon. PETER BREEN: Yes.

Mr O'NEILL: It was called the Victorian Guardianship and Administration Board, but did not have provisions which required the expert members to sit on each matter.

The Hon. JOHN HATZISTERGOS: What aspects of VCAT are you critical of in the way it deals with guardianship matters?

Mr O'NEILL: It is a more formal process. In their sittings in, I suppose it is the tribunal building in Melbourne, they sit a step up and with barriers between them and people. They sit with a single member, usually a lawyer, and that is not the model that exists in New South Wales. We think ours is far better in terms of the tribunal being more able to understand the issues and make an appropriate decision.

We deal with more guardianship issues in New South Wales than they do. They tend to deal mostly with financial management, they call it administration, where they simply make financial management orders. We also have a greater role in relation to medical and dental treatment, where it is very helpful to have medical members on the tribunal. So, it is not exactly the same. Our tribunal is rather different, in fact. But I do not spend much time in Melbourne, it is rather difficult for me—

The Hon. JOHN HATZISTERGOS: One of the suggestions made by Justice Kellam was that if you have a tribunal that has a number of different responsibilities, that leads to greater efficiencies and greater access, particularly in regional areas, because they are able to provide a facility for the tribunal to sit and deal with a volume of work, which may not be justified in the event that the tribunal only had a limited jurisdiction, one case or two cases. Therefore, people in regional and rural locations have greater access to the tribunal in the areas where they live. What do you say about that?

Mr O'NEILL: We have always had, and I think we effectively carry out our strong commitment to provide good access to the Guardianship Tribunal for people all over New South Wales, including Broken Hill, which we visit each year. There are different ways of doing this. We believe the best way to do it is to have the people who are expert members of the Guardianship Tribunal doing it rather than having other people, who are less expert in the field, doing the job. We can deliver on that. At the moment we get the resources to do it and we do it.

The Hon. JOHN HATZISTERGOS: Another issue he says is important is the fact there is judicial leadership of the tribunal. He said that that allows, amongst other things, an opportunity for the tribunal to be able to palm off to judicial members, the permanent judges, and so on, the more difficult or controversial cases so that parties do not feel they will have a part-time member or a person who is under a limited contract hearing the case and there might be perceptions in that sort of instance that the outcome might be somewhat tailored towards achieving a reappointment. That is what he says. You do not have that facility, I take it?

Mr O'NEILL: I doubt whether he would go quite that far—

The Hon. JOHN HATZISTERGOS: I think he did actually.

Mr O'NEILL: —and suggest that people have an eye on reappointment. In the guardianship field you are not dealing with government anyway, it is about whether or not a particular private

individual should have a guardianship or financial management order. So, there is not the problem that perhaps you might run up against if you are dealing with freedom of information, for example. So, there has never been an issue of that kind. We have had retired judges as members of the tribunal. I have very great confidence in the fearlessness of our part-time members, and their willingness to make the hard decisions, because they have had to do it quite regularly. They are all qualified to be judges but as yet none of them have been appointed judges. They are all people of the highest integrity who are capable and do make the hard decisions, knowing that some people are going to be unhappy with those decisions and complain politically as well as consider their rights to appeal.

There is also an important issue that should not be forgotten in relation to the Guardianship Tribunal of New South Wales which marks it off from the Victorian tribunal and some of its other colleagues. We have to provide and do provide written reasons for every decision. So, what we have decided is set out for people to consider. We have to then, effectively in writing, justify our decision. That is a very good discipline for keeping us honest, as it were, but it also provides a permanent record for people to see the evidence upon which we made our decision that this person had lost capacity and needed a guardian—or did not need a guardian, because we do not make orders in every case. In probably a third of the cases we hear we do not make an order, but we set out why we have taken the action, and it is all there, written. If we do make a guardianship order which is subject to review, we set out often what we hope will be achieved by the order so you have something to judge the situation against when the review time arises.

The Hon. JOHN HATZISTERGOS: Is it possible for the Guardianship Tribunal to be incorporated into a large tribunal in New South Wales and for it to operate as effectively as it does at the moment?

Mr O'NEILL: It is certainly possible, because any legislative structure can be set out. Then it would be up to the leadership of the tribunal to ensure that it continued to operate effectively.

The Hon. JOHN HATZISTERGOS: What safeguards would you like to see incorporated into any legislation which might lead to that outcome?

Mr O'NEILL: I would want the legislation to be largely as it presently is. There is room for improvement on some fronts but as long as only people with the expertise that I have referred to a few times are able to sit on the tribunal, then I would be happy with that. Obviously it is up to the government of the day and through the parliamentary processes to establish the new system, but if that was put in place and if I were the president of the tribunal I would do all I can to make sure that it all worked properly.

Mr W. D. SMITH: Could you just outline to us one specific case, perhaps hypothetical, that might not be dealt with as well in the generic model as it would in your tribunal?

Mr O'NEILL: The real question for me is not that. If it was decided to create a very large tribunal and to have various lists in it, then if it was structured the way I hope it would be, with the continuation of the same membership, you would not see a difficulty. The problem for me is whether it is appropriate to go through this whole process, with all the attendant risks of it not working, unless a need is shown to go through this process. That is really the nub of my concern. I would believe that people structuring the new legislation would tend just to adopt across into the new structure the existing tribunal. It would need to take across with the same membership the same commitment to continue that quality of membership and to continue the level of training that we have, because there is a lot of information and new experience that needs to be brought to the attention of tribunal members in this area. The knowledge of what is happening in the disability field is changing and developing all the time. You could set up such a structure. My concern is you would not always have the same level of commitment, because those responsible for running this new organisation would have to have the same sort of responsibilities to all sorts of different areas. I think that is where the risks lie, because there will be a tendency to see things perhaps more through this way rather than that way. I have some concerns about that.

The Hon. JOHN HATZISTERGOS: Knowing what the jurisdiction of the ADT is, are there areas where you believe that amalgamation could assist the ADT in its other jurisdictions?

Mr O'NEILL: No, not really. I think the ADT—

The Hon. JOHN HATZISTERGOS: In the generic areas of training?

Mr O'NEILL: Well, what I was trying to say in relation to training is I think there are a few areas for co-operation but I think there is also a need to appreciate that each of the different areas needs specific training relating to those areas. We certainly do in the guardianship and financial management areas.

The Hon. JOHN HATZISTERGOS: You mentioned a couple of areas in your training that I thought could be useful to other areas, for example, the way to appreciate evidence, and matters of that kind. If you are particularly skilled in those areas, is that not something you could bring to the benefit of other members in other jurisdictions?

Mr O'NEILL: Yes, but there is a limit in relation to that. It is an issue you have to keep before you but you do not need to go through repeat training on a very regular basis about that. It is not a large issue. What I would like to see the Administrative Decisions Tribunal do is develop as precisely that, with a bigger jurisdiction to review administrative decisions. That is what it was established for and that is the direction it should go in. But of course it is dependent upon Parliament giving it its jurisdiction.

(The witness withdrew)

(Luncheon adjournment)